Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-14-94
GOPAL SRI RAM, NH CHAN AND VC GEORGE JJCA
8 MAY 1995

Administrative Law *— Remedies — Certiorari and mandamus — Ouster of judicial review — When High Court may review decision of Industrial Court — Whether there should be distinction between error of law on the face of record and error of law going to jurisdiction — Whether certiorari available to review Industrial Court's exercise of interpretative jurisdiction under s 33(1) of the Industrial Relations Act 1967 — Industrial Relations Act 1967 ss 33(1) & 33B(1)*

Statutory Interpretation *— Construction of statutes — Labour legislation — Purpose of — Approach to interpreting Industrial Relations Act 1967*

Labour Law *— Industrial Court — Jurisdiction — Whether s 33(1) and (2) of Industrial Relations Act 1967 confer separate jurisdictions — Limit of power under s 30(6) to make award which is necessary or expedient to settle dispute — Whether court restricted to specific relief claimed — Whether acting in excess of jurisdiction if court makes interpretation under s 33(1) when exercising enforcement jurisdiction under s 56(1) — Industrial Relations Act 1967 ss 30(6), 33(1), (2) & 56(1)*

Labour Law *— Industrial Court — Award — Application for interpretation — Award clear and unambiguous — Whether uncertainty or ambiguity a condition precedent — Award made no mention of emoluments and bonuses — Whether application for enforcement should be made under s 56(1) instead — Industrial Relations Act 1967 ss 33(1) & 56(1)*

Labour Law *— Industrial Court — Procedure — Non-compliance with Industrial Court award or collective agreement — Whether trade dispute — Whether matter should proceed as reference on trade dispute under s 26 or as complaint of non-compliance under s 56 of the Industrial Relations Act 1967 — Industrial Relations Act 1967 ss 26 & 56*

On 2 June 1988, the Industrial Court ('the court') handed down an award ('the first award') in respect of a trade dispute referred to it by the Minister under s 26 of the Industrial Relations Act 1967 ('the Act'). It concerned a complaint by the respondent union that several of its members had been dismissed by the appellant company without just cause. In this first award, the court, inter alia, struck down the dismissal of some of the workmen as being unjustified and ordered their reinstatement as well as the payment of their back wages. In awarding back wages, however, the court made no mention of other emoluments, such as the special relief allowance or bonus, both of which were provided for in arts 18 and 20 of the collective agreement between the respondent and the appellant. The appellant did not pay the arrears of the special relief allowance or the bonuses declared during the period these workmen remained out of employment.

Dissatisfied, the respondent applied to the court under s 33(1) of the Act for an interpretation of the first award and arts 18 and 20 of the collective agreement. The application was made in Form M of the Industrial Court Rules 1967 ('the Rules'). A

In a written award dated 6 January 1994 ('the second award'), the court rejected the respondent's application on the ground that the first award was clear and unambiguous and that it was not within its jurisdiction to interpret or rewrite the first award. The respondent then took out a motion for certiorari and mandamus. The High Court acceded to it, quashed the second award and issued mandamus directing the court to render an interpretation according to law. The appellant appealed to the Court of Appeal against the decision of the High Court. The key issues to be decided were: (a) whether an application under s 33(1) of the Act was the correct mode to adopt; and (b) whether the court, in considering that the first award was unambiguous and required no interpretation, committed an error of law which warranted the issue of certiorari by the High Court. B C D

Held, dismissing the appeal:

(1) (Per **Gopal Sri Ram JCA**) Parliament has attempted to exclude judicial review of the decisions of the court by providing in s 33B(1) of the Act that an award, decision or order of the court under the Act shall be final and conclusive. However, an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not. Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted. E F

(2) (Per **Gopal Sri Ram JCA**) A judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the legislature as gathered from the words of the Act and from such other sources as the law declares admissible. The Act is a piece of social legislation to promote industrial harmony, the interpretation of which should be liberal in order to achieve the object aimed at by Parliament. G

(3) (Per **Gopal Sri Ram JCA**) When Parliament enacted s 33(1) and (2) of the Act, it intended to meet two distinct situations that so often arise in the course of industrial adjudication. Section 33(1) deals with an interpretation of an award or an agreement, while s 33(2) is intended to cover a situation where a variation of an award or collective agreement is sought by one of the parties thereto. H I

(4) (Per **Gopal Sri Ram JCA**) In the present case, all that the court had to do was to interpret the meaning of the expression of 'back wages'. The application made by the respondent in

Form M, which is required by r 14 of the Rules to be used in applications made under s 33(1) of the Act, made it clear that it was moving the court under s 33(1). As the respondent was not proceeding under s 33(2), any question of ambiguity or uncertainty in the first award was irrelevant.

(5) (Per **Gopal Sri Ram JCA**) Where an employer and his workmen are in dispute over the terms of an award or collective agreement, resort should be had to s 33(1) and not to s 56(1) of the Act. As the dispute between the appellant and the respondent was on the meaning of the expression 'back wages' appearing in the first award, the respondent was correct in applying for an interpretation under s 33(1). Besides it was clear that neither the court nor the appellant was misled to believe that enforcement of the first award was being sought by the respondent through the machinery of s 33(1) of the Act.

(6) (Per **Gopal Sri Ram JCA**) The court, faced with the respondent's application under s 33(1) of the Act, was under a statutory duty to interpret the first award and the two relevant articles in the collective agreement. Since the Act does not prescribe uncertainty or ambiguity as a condition precedent to the exercise of the jurisdiction in question, the court most certainly erred in construing s 33(1). Further, by conducting a search for an ambiguity and uncertainly in the first award, the court took into account an irrelevant consideration and asked itself the wrong question when undertaking the decision-making process. It was thus quite clear that the court made an error of law in the second award.

(7) (Per **Gopal Sri Ram JCA**) Accordingly the second award was invalid and was liable to be quashed by certiorari. The court having failed to perform its duty under s 33(1) of the Act, it was right that the High Court remitted the matter to the court with a direction that it considered the respondent's application according to law.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168 (folld)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; [1982] 1 WLR 1155 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Diwan Badri Dass, RB & Ors v Industrial Tribunal, Punjab, Patiala & Ors AIR 1963 SC 630 (refd)

Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor [1991] 1 MLJ 89 (folld)

Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor [1987] 2 MLJ 81 (folld)

Dutt, Dr A v Assunta Hospital [1981] 1 MLJ 304 (folld)
Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (folld)
Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175 (folld)
Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (not folld)
Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 (folld)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297 (refd)
Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Ors [1974] 1 MLJ 90 (folld)
Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors [1974] 2 MLJ 41 (folld)
Narendra Kumar Sen v Labour Appellate Tribunal (1953) 1 LLJ 6 (folld)
O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 All ER 1124 (folld)
Page v Hull University Visitor [1993] AC 682; [1993] 1 All ER 97 (folld)
R v Clarkson & Anor, ex p General Motors-Holden's Pty Ltd & Ors (1975) 134 CLR 56 (folld)
R v Commonwealth Court of Conciliation and Arbitration, ex p Kirsch (1938) 60 CLR 507 (folld)
R v Galvin & Anor, ex p Amalgamated Engineering Union (1952) 86 CLR 34 (folld)
Racal Communications Ltd, Re [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181 (folld)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308 (refd)
South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165 (not folld)
Sungai Wangi Estate v Uni [1975] 1 MLJ 136 (overd)
Trengganu Bus Co Sdn Bhd v Transport Workers Union [1983] 1 MLJ 393 (overd)
Western India Automobile Association v Industrial Tribunal, Bombay AIR 1949 FC 111 (folld)
Workmen of Dimmakuchi Tea Estate v Management of Dimmakuchi Tea Estate [1958] 1 LLJ 500 (refd)
Workmen of Indian Standards Institution v Management of Indian Standards Institution [1976] 1 LLJ 33 (folld)
Yee Yut Ee, Re [1978] 2 MLJ 142 (folld)

(8) (Per **VC George JCA**) It would appear that in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363; [1980] 2 All ER 689;

[1980] 2 MLJ 165, the Privy Council had misread the effect of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168 and that *South East Asia* might be regarded as controversial, as a result of which it was now open to the superior courts of Malaysia to refuse to follow *South East Asia*, if they chose to do so, without being guilty of judicial impertinence.

(9) (Per **VC George JCA**) It was now time to discard the distinction between an error of law which affected jurisdiction and one which did not. Inferior courts and statutory tribunals were not given the jurisdiction to make an error of law and it followed that such errors of law, whether on the face of the record or not, in reality went to jurisdiction.

(10) (Per **VC George JCA**) Parliament had enacted s 33(1) and (2) to cover different situations, s 33(1) in respect of interpretation of some term or provision either in an award or collective agreement, and s 33(2) when a party was seeking, not an interpretation, but a variation for the purpose only of removing some uncertainty or ambiguity in an award or collective agreement. The provision of separate prescribed forms in the Rules for the respective applications under each subsection confirmed that there was a deliberate dichotomy manifested by there being the two subsections.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168 (folld)

Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (folld)

Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Ors [1974] 1 MLJ 90 (folld)

Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors [1974] 2 MLJ 41 (folld)

O'Reilley v Mackman [1983] 2 AC 237; [1982] 3 All ER 1124 (refd)

Page v Hull University Visitor [1993] AC 682; [1993] 1 All ER 97 (folld)

Pearlman v Keepers and Governors of Harrow School [1979] 1 QB 56; [1979] 1 All ER 365; [1978] 3 WLR 736 (folld)

Racal Communication Ltd, Re [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181 (refd)

South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165 (not folld)

Per curiam:

(1) (Per **Gopal Sri Ram JCA**) The disregard of form in industrial law does not include the settling of documents in cryptic and

incomprehensible language. Whilst perfection in drafting is not called for, some care must be taken to ensure that no one is misled by the contents of any pleading delivered in proceedings before the court.

(2) (Per **Gopal Sri Ram JCA**) Jurisdiction is exceeded when error of law is committed, an unfair procedure is adopted, or where the decision reached is unreasonable, However, it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed.

(3) (Per **Gopal Sri Ram JCA**) It is strange that so much should depend on the kind of remedy that is applied for in applications for judicial review. This should not be so and, in my opinion, an amendment to O 53 of the Rules of the High Court 1980 is certainly called for.

(4) (Per **Gopal Sri Ram JCA**) In a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognizance of by the court, it is impractical for the matter to proceed as a trade dispute under s 26 of the Act which will involve a reactivation ab initio and repetition of the whole tedious exercise of conciliation and consequential process under s 26 by reference to the court once again for resolving a trade dispute.

(5) (Per **Gopal Sri Ram JCA**) The question whether the court, when entertaining a complaint under s 56(1) of the Act, has indeed acted in excess of its jurisdiction by exercising its powers under s 33(1), is one that depends upon the peculiar circumstances of a particular case.

(6) (Per **Gopal Sri Ram JCA**) The legal proposition that certiorari is not available to review a decision made by the court in the exercise of its interpretative jurisdiction under s 33(1) of the Act is not good law. Since the court is an inferior tribunal created by statute, it is the duty of the High Court to exercise supervision over all of its decisions. The circumstances and the extent to which such supervision will lie is regulated by well established principles that govern prerogative remedies.

(7) (Per **Gopal Sri Ram JCA**) Although s 30(6) of the Act allows the court to include in its award any matter which it thinks necessary or expedient for the purpose of settling the dispute, the court can only make an award for the settlement of the actual dispute between the parties. The limits imposed by s 30(6) of the Act will not be exceeded so long as there is a rational nexus between the relief given by the court and the dispute it seeks to resolve, bearing in mind that a flexible approach is called for when considering the relief that is to be granted by the court in a particular case.

A (8) (Per **Gopal Sri Ram JCA**) It is incorrect to suggest that the statutory direction contained in s 30(6) of the Act is confined to trade disputes and references under s 20(3) of the Act.

[Bahasa Malaysia summary

B Pada 2 Jun 1988, Mahkamah Perusahaan ('mahkamah itu') telah membuat satu award ('award pertama') berkenaan dengan suatu pertikaian perusahaan yang telah dirujuk kepadanya oleh Menteri di bawah s 26 Akta Hubungan Perusahaan 1967 ('Akta itu'). Award pertama itu adalah bersangkutan dengan satu aduan oleh kesatuan responden bahawa beberapa ahlinya telah dipecat oleh syarikat perayu C tanpa sebab yang adil. Di dalam award pertama ini, mahkamah itu, antara lainnya, telah membatalkan pemecatan beberapa orang pekerja itu sebagai tidak berasas dan mengarahkan pengembalian semula pekerja-pekerja itu berserta dengan pembayaran gaji tertunda mereka. Dalam membuat award gaji tertunda, walau bagaimanapun, D mahkamah itu tidak menyatakan apa-apa tentang emolumen lain, seperti elaun relief khas atau bonus, yang kedua-duanya diperuntukkan di dalam perkara 18 dan 20 persetujuan kolektif di antara responden dan perayu. Perayu tidak membayar tunggakan elaun relief khas atau bonus yang telah diberikan sepanjang tempoh bilamana pekerja-pekerja itu tidak digaji. Tidak berpuas hati, responden memohon E kepada mahkamah itu di bawah s 33(1) Akta itu untuk satu tafsiran award pertama itu dan perkara 18 dan 20 persetujuan kolektif itu. Permohonan itu telah dibuat di dalam Borang M Kaedah-Kaedah Mahkamah Perusahaan 1967 ('Kaedah-Kaedah itu').

Di dalam satu award bertulis bertarikh 6 Januari 1994 ('award F kedua'), mahkamah itu telah menolak permohonan responden atas dasar bahawa award pertama itu adalah jelas dan tidak taksa dan bahawa adalah di luar bidang kuasanya untuk mentafsir atau menulis semula award pertama itu. Responden kemudiannya mengemukakan satu usul untuk perintah certiorari dan mandamus. Mahkamah Tinggi telah membenarkan permohonan tersebut, membatalkan award kedua G itu dan mengeluarkan perintah mandamus untuk mengarahkan mahkamah itu supaya memberikan satu tafsiran mengikut undang-undang. Perayu telah membuat rayuan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi itu. Isu-isu utama yang harus diputuskan adalah: (a) sama ada satu permohonan di bawah s 33(1) H Akta itu adalah aturcara yang betul; dan (b) sama ada mahkamah itu, dalam memutuskan bahawa award pertama itu adalah tidak taksa dan tidak memerlukan tafsiran, telah melakukan satu kesilapan di sisi undang-undang yang menjadikan pengeluaran certiorari oleh Mahkamah Tinggi perlu.

I **Diputuskan**, menolak rayuan itu:

(1) (Oleh **Gopal Sri Ram HMR**) Parlimen telah mencuba mengetepikan kajian semula kehakiman keputusan-keputusan

mahkamah dengan memperuntukkan di dalam s 33B(1) Akta itu bahawa suatu award, keputusan atau perintah mahkamah itu di bawah Akta itu adalah terakhir dan muktamad. Namun demikian, satu tribunal bawahan atau pihak berkuasa lain yang membuat keputusan, sama ada menjalankan satu fungsi kuasi-kehakiman atau satu fungsi pentadbiran tulen, tidak mempunyai bidang kuasa untuk melakukan satu kesilapan di sisi undang-undang, sama ada kesilapan itu bersifat bidang kuasa atau tidak. Oleh kerana satu tribunal bawahan tidak ada bidang kuasa untuk membuat satu kesilapan di sisi undang-undang, keputusannya tidak akan dikebalkan daripada kajian semula kehakiman oleh satu fasal penyingkiran, walau berapa lebar pun fasal itu digubal.

(2) (Oleh **Gopal Sri Ram HMR**) Seorang hakim tidak patut memberikan tafsiran kepada mana-mana Akta Parlimen yang membawa kesan menghasilkan satu keputusan yang bertentangan dengan apa yang menjadi niat kolektif badan perundangan sebagaimana yang boleh difahami daripada perkataan-perkataan Akta itu dan daripada sumber-sumber lain yang dibenarkan oleh undang-undang. Akta itu adalah satu perundangan sosial untuk menggalakkan keharmonian perusahaan, dan tafsirannya patutlah liberal supaya sasaran yang ditujui oleh Parlimen boleh dicapai.

(3) (Oleh **Gopal Sri Ram HMR**) Apabila Parlimen menggubalkan s 33(1) dan (2) Akta itu, ia bertujuan memenuhi dua keadaan berlainan yang begitu kerap timbul di dalam penghakiman perusahaan. Seksyen 33(1) adalah berkenaan dengan tafsiran satu award atau satu persetujuan, sementara s 33(2) bertujuan merangkumi keadaan di mana variasi satu award atau persetujuan kolektif dipohon oleh salah satu pihak yang berkenaan.

(4) (Oleh **Gopal Sri Ram HMR**) Di dalam kes ini, apa yang patut dilakukan oleh mahkamah ialah mentafsirkan makna ungkapan 'gaji tertunda'. Permohonan yang dibuat oleh responden di dalam Borang M, yang wajib digunakan mengikut k 14 Kaedah-Kaedah itu di dalam permohonan yang dibuat di bawah s 33(1) Akta itu, menunjukkan dengan jelas bahawa ia memohon kepada mahkamah di bawah s 33(1). Oleh kerana responden tidak bertindak di bawah s 33(2), apa-apa soalan ketaksaan atau ketidakpastian di dalam award pertama itu adalah tidak relevan.

(5) (Oleh **Gopal Sri Ram HMR**) Apabila seorang majikan dan pekerjanya bertikai tentang syarat-syarat suatu award atau persetujuan kolektif, s 33(1) patut digunakan dan bukan s 56(1) Akta itu. Oleh kerana pertikaian di antara perayu dan responden tertumpu atas makna ungkapan 'gaji tertunda' yang terdapat di dalam award pertama itu, responden adalah betul apabila membuat permohonan untuk suatu pentafsiran di bawah s 33(1). Di samping itu, adalah jelas bahawa kedua-dua mahkamah dan

perayu tidak terkeliru untuk mempercayai bahawa pelaksanaan award pertama itu dipohon oleh responden melalui jentera s 33(1) Akta itu.

(6) (Oleh **Gopal Sri Ram HMR**) Mahkamah itu, berhadapan dengan permohonan responden di bawah s 33(1) Akta itu, mempunyai suatu tugas statutori untuk mentafsirkan award pertama itu dan kedua-dua perkara yang berkenaan di dalam persetujuan kolektif itu. Oleh kerana Akta itu tidak menggariskan ketidakpastian atau ketaksaan sebagai satu syarat terdahulu kepada penggunaan bidang kuasa yang disoal itu, mahkamah itu sudah tentunya telah tersilap dalam mentafsirkan s 33(1). Lagipun, dalam usaha mencari satu ketaksaan dan ketidakpastian di dalam award pertama itu, mahkamah itu telah mempertimbangkan satu faktor yang tidak relevan and telah menanyakan dirinya soalan yang salah apabila menjalankan proses membuat keputusan itu. Lantaran itu, memanglah jelas bahawa mahkamah itu telah membuat satu kesilapan di sisi undang-undang di dalam award kedua itu.

(7) (Oleh **Gopal Sri Ram HMR**) Dengan demikian, award kedua itu adalah tidak sah dan mestilah dibatalkan dengan certiorari. Memandangkan yang mahkamah itu telah gagal menjalankan tugasnya di bawah s 33(1) Akta itu, adalah betul bahawa Mahkamah Tinggi meremit perkara itu kepada mahkamah itu dengan arahan supaya ia mempertimbangkan permohonan responden itu mengikut undang-undang.

(8) (Oleh **VC George HMR**) Nampaknya bahawa di dalam kes *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165, Privy Council telah salah memahami kesan kes *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168 dan bahawa kes *South East Asia* boleh dianggap sebagai kontroversial, dan oleh itu adalah sekarang terbuka untuk mahkamah atasan Malaysia enggan mengikut kes *South East Asia*, jika mereka memilih untuk berbuat demikian, tanpa bersalah kerana ketidaksopanan kehakiman.

(9) (Oleh **VC George HMR**) Sekarang menjadi masanya untuk menyingkirkan perbezaan di antara satu kesilapan di sisi undang-undang yang membawa kesan ke atas bidang kuasa dan satu kesilapan yang tidak. Mahkamah bawahan dan tribunal statutori tidak diberi bidang kuasa untuk membuat satu kesilapan di sisi undang-undang dan dengan itu kesilapan di sisi undang-undang sedemikian, sama ada di atas rekod atau tidak, pada hakikatnya membawa kesan ke atas bidang kuasa.

(10) (Oleh **VC George HMR**) Parlimen telah menggubalkan s 33(1) dan (2) untuk merangkumi keadaan yang berlainan, s 33(1) berkenaan dengan pentafsiran sesuatu syarat atau peruntukan

sama ada di dalam suatu award atau persetujuan kolektif, dan s 33(2) apabila satu pihak memohon, bukan suatu pentafsiran, tetapi satu variasi cuma untuk tujuan menyingkirkan sesuatu ketidakpastian atau ketaksaan tertentu di dalam suatu award atau persetujuan kolektif. Peruntukan borang-borang yang berlainan di dalam Kaedah-Kaedah itu untuk permohonan di bawah setiap seksyen kecil yang berkenaan mengesahkan bahawa terdapat perbezaan yang diniatkan yang ditunjukkan oleh adanya kedua-dua seksyen kecil itu.

Per curiam:

(1) (Oleh **Gopal Sri Ram HMR**) Sikap tidak mengendahkan bentuk di dalam undang-undang perusahaan tidak merangkumi penyediaan dokumen-dokumen di dalam bahasa yang mempunyai maksud tersembunyi dan yang tidak boleh difahami. Walaupun kesempurnaan di dalam penyediaan draf tidak diperlukan, sedikit sebanyak ketelitian mesti digunakan untuk memastikan bahawa tidak sesiapa akan terkeliru dengan kandungan mana-mana pliding yang disampaikan di dalam prosiding di mahkamah.

(2) (Oleh **Gopal Sri Ram HMR**) Bidang kuasa dilampaui apabila kesilapan di sisi undang-undang dilakukan, apabila satu prosedur yang tidak adil digunakan, atau di mana keputusan yang dicapai adalah tidak munasabah. Walau bagaimanapun, adalah tidak berkesan atau dimahukan untuk mencuba mentakrifkan secara penuh apakah yang merupakan kesilapan di sisi undang-undang, kerana kategori kesilapan sedemikian tidaklah tertutup.

(3) (Oleh **Gopal Sri Ram HMR**) Adalah aneh bahawa begitu banyak patut bergantung kepada jenis remedi yang dipohon di dalam permohonan untuk kajian semula kehakiman. Ini tidaklah patut dan, di dalam pendapat saya, pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 sememangnya diperlukan.

(4) (Oleh **Gopal Sri Ram HMR**) Di dalam suatu kes yang jelas dan tidak ditentang mengenai ketidakpatuhan semata-mata satu syarat di dalam satu award atau persetujuan kolektif yang diambil tahu oleh mahkamah itu, adalah tidak praktikal jika perkara itu diteruskan sebagai satu pertikaian perusahaan di bawah s 26 Akta itu yang akan melibatkan permulaan tindakan itu semula dan ulangan seluruh gerak kerja pendamaian yang menjemukan dan proses berbangkit di bawah s 26 melalui rujukan kepada mahkamah itu sekali lagi untuk penyelesaian pertikaian perusahaan itu.

(5) (Oleh **Gopal Sri Ram HMR**) Soalan sama ada mahkamah itu, apabila mempertimbangkan satu aduan di bawah s 56(1) Akta itu, sebenarnya telah bertindak melampaui bidang kuasanya dengan menggunakan kuasanya di bawah s 33(1), bergantung kepada keadaan-keadaan khas sesuatu kes itu.

(6) (Oleh **Gopal Sri Ram HMR**) Hujah bahawa certiorari tidak boleh digunakan untuk mengkaji semula satu keputusan yang dibuat oleh mahkamah itu di dalam penggunaan bidang kuasa pentafsirannya di bawah s 33(1) Akta itu bukanlah undang-undang yang betul. Oleh kerana mahkamah itu adalah satu tribunal bawahan yang ditubuhkan oleh statut, adalah menjadi tugas Mahkamah Tinggi untuk mengawasi kesemua keputusan mahkamah itu. Keadaan dan setakat mana pengawasan itu akan dijalankan dikawal oleh prinsip-prinsip mantap yang mengawal remedi prerogatif.

(7) (Oleh **Gopal Sri Ram HMR**) Walaupun s 30(6) Akta itu membolehkan mahkamah itu memasukkan di dalam awardnya apa-apa perkara yang difikirkan perlu atau wajar bagi tujuan menyelesaikan pertikaian di antara pihak-pihak itu, mahkamah itu hanya boleh membuat suatu award untuk menyelesaikan pertikaian sebenar di antara pihak-pihak itu. Batas-batas yang dikenakan oleh s 30(6) Akta itu tidak akan dilepasi jika terdapat hubungan yang rational di antara relief yang diberikan oleh mahkamah itu dan pertikaian yang ingin diselesaikannya. Dalam mempertimbangkan relief yang patut diberikan oleh mahkamah itu di dalam sesuatu kes tertentu, satu pendekatan yang fleksibel mestilah digunakan.

(8) (Oleh **Gopal Sri Ram HMR**) Adalah tidak betul untuk menyarankan bahawa arahan statutori yang terkandung di dalam s 30(6) Akta itu dihadkan kepada pertikaian perusahaan dan rujukan-rujukan di bawah s 20(3) Akta itu.]

Notes

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed) paras 48–167, 264–268; [1991] Mallal's Digest 19–26, 29; [1992] Mallal's Digest 13–14; [1993] Mallal's Digest 7–9.

For cases on Industrial Court awards, see 8 *Mallal's Digest* (4th Ed) paras 695–707; [1989] Mallal's Digest 951; [1991] Mallal's Digest 1283.

For cases on the jurisdiction of the Industrial Court, see 8 *Mallal's Digest* (4th Ed) paras 714–730; [1991] Mallal's Digest 1284–1285; [1992] Mallal's Digest 1162–1165; [1993] Mallal's Digest 932–933.

For cases on Industrial Court procedure, see 8 *Mallal's Digest* (4th Ed) para 732; [1991] Mallal's Digest 1287.

Complete list of cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; [1982] 1 WLR 1155

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345

Diwan Badri Dass, RB & Ors v Industrial Tribunal, Punjab, Patiala & Ors AIR 1963 SC 630

Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor [1991] 1 MLJ 89

Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor [1987] 2 MLJ 81

Dutt, Dr A v Assunta Hospital [1981] 1 MLJ 304

Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18

Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417

Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306

Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297

Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Ors [1974] 1 MLJ 90

Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors [1974] 2 MLJ 41

Narendra Kumar Sen v Labour Appellate Tribunal (1953) 1 LLJ 6

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 All ER 1124

Page v Hull University Visitor [1993] AC 682; [1993] 1 All ER 97

Pearlman v Keepers and Governors of Harrow School [1979] 1 QB 56; [1979] 1 All ER 365; [1978] 3 WLR 736

R v Clarkson & Anor, ex p General Motors-Holden's Pty Ltd & Ors (1975) 134 CLR 56

R v Commonwealth Court of Conciliation and Arbitration, ex p Kirsch (1938) 60 CLR 507

R v Galvin & Anor, ex p Amalgamated Engineering Union (1952) 86 CLR 34

Racal Communications Ltd, Re [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308

South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165

Sungai Wangi Estate v Uni [1975] 1 MLJ 136

Trengganu Bus Co Sdn Bhd v Transport Workers Union [1983] 1 MLJ 393

Western India Automobile Association v Industrial Tribunal, Bombay AIR 1949 FC 111

Workmen of Dimmakuchi Tea Estate v Management of Dimmakuchi Tea Estate (1958) 1 LLJ 500

Workmen of Indian Standards Institution v Management of Indian Standards Institution (1976) 1 LLJ 33

Yee Yut Ee, Re [1978] 2 MLJ 142

Legislation referred to

Industrial Relations Act 1967 ss 20(1), (3), 26, 30(6), 33(1), (2), 33A, 33B(1), 52(2), 56
Industrial Court Rules 1967 rr 14, 15, Forms M, N
Conciliation and Arbitration Act (Cth) 1904–1950 s 42 [Aust]
Industrial Dispute Act 1947 [Ind]
Industrial Relations Act (Cap 24) s 46 [Sing]
Rules of the Supreme Court O 53 [Eng]

Appeal from: Originating Motion No R1–25–13–94 (High Court, Kuala Lumpur)

TM Varughese (*TM Varughese & Co*) for the appellant.
Anand Ponnudurai (*Lobo & Associates*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA:

Introduction

On 3 August 1994, the High Court at Kuala Lumpur, in proceedings commenced by the respondent union, granted certiorari and quashed an award of the Industrial Court dated 6 January 1994. It also issued mandamus directing it to reconsider the matter according to law. The appellant company, being dissatisfied with this decision has appealed. This court heard the appeal on 10 and 12 April 1995, and reserved judgment. I now hand down the decision that I have arrived at and the reasons for the same. For convenience, I shall, throughout this judgment, refer to the Industrial Court as 'the court', the Industrial Relations Act 1967 as 'the Act', and the Industrial Court Rules 1967 as 'the Rules'.

Background

On 2 June 1988, the court handed down an award ('the first award'), in respect of a trade dispute referred to it by the Minister under s 26 of the Act. It concerned a complaint by the respondent union that several of its members had been dismissed by the appellant company without just cause or excuse. By the first award, the court struck down the dismissal of some of the workmen as being unjustified. It upheld the dismissal of others. In respect of those workmen whose dismissals had been struck down, the court awarded the following relief:

> 3(i) The company shall reinstate claimants No 4 to No 19 of Sch A into their former jobs without loss of seniority, with effect from 11 June 1988; and
>
> (ii) within two (2) weeks of the said claimants No 4 to No 19 of Sch A reporting for duty, the company shall pay through the Union's solicitors their back wages from the date of dismissal to the date of reinstatement, calculated at 26 days per month in accordance with the daily wages set

out in Sch A of this award. Their contributions to the Employees' Provident Fund for the above period shall be deducted from the respective back wages. A

The first award is reported in (1988) 1 ILR 489.

As may be seen, the court merely awarded wages. It made no mention of other emoluments, such as the special relief allowance or bonus. There is a reference to these two items in the collective agreement which the respondent had with the appellant. They appear in arts 18 and 20 of that agreement. These two articles when translated read as follows: B

18 Special relief allowance

Every worker covered by this agreement shall be paid a special relief allowance of RM30 per month and an additional special relief allowance of RM2.30 per day for every actual day worked inclusive of annual leave. This additional allowance shall not be paid if the worker: C

18.1 is granted non-hospitalized medical leave

18.2 is on his weekly off day D

18.3 is absent from work for whatever reason.

20 Bonus

20.1 The company shall pay bonus based on the performance and profitability of the company for that particular year to all regular workers. Workers who have not completed one year service for that particular year shall be paid on a pro rata basis. Discussions on the payment of bonus shall be held every year between the union and the employer. E

20.2 Payment of bonus to workers in accordance with 20.1 will be based on the basic salary of the workers as at 31 December every year. F

20.3 Workers who resigned or are terminated before 31 December or before the date of declaration of payment of bonus by the board of directors will not be eligible for bonus payment for that particular year.

The appellant, in what it regarded as full compliance of the terms of the first award, effected payment of all wages due to the reinstated workmen. But it did not pay arrears of the special relief allowance or the bonuses declared during the period these workmen remained out of employment. The respondent was dissatisfied with this result. After a preliminary exchange of correspondence, it applied to the court for an interpretation of the first award and arts 18 and 20 of the collective agreement. That application was made pursuant to s 33(1) of the Act. It was made in Form M, which is the form prescribed by the Rules for the making of an application under the first subsection to s 33. What the respondent intended to have from the court was an interpretation of the expression 'back wages' appearing in the first award. The respondent was obviously contending that the expression 'back wages' included the two monetary benefits that the appellant had refused to pay. The respondent's application was poorly G H I

A settled. Counsel for the respondent was unable to say who drafted it. It reads as follows:

> The employees reinstated pursuant to award No 138/1988 are entitled to unpaid arrears of SRA [meaning the special relief allowance] and bonus for the period 10 September 1986 to 1 March 1991 pursuant to arts 18 and 20 respectively of the said collective agreements upon their reinstatement on 2 March 1991. The period they stood dismissed unjustly was from 10 September 1986 to 1 March 1991. Only bonus for 1990 has been paid.

As may be seen, this document does not say a word about the interpretation that was obviously being contended for by the respondent. I must pause to say that the disregard of form in industrial law does not include settling documents in cryptic and incomprehensible language. Whilst perfection in drafting is not called for, it is axiomatic that some care must be taken to ensure that no one is misled by the contents of any pleading delivered in proceedings before the court. Fortunately, in the present case, the appellant did in fact appreciate what the respondent was contending for. This comes across in the appellant's statement in reply dated 29 November 1993, paras 1, 3 and 4 of which read as follows:

> (1) The company do[es] not admit what the union contends on the interpretation on the award No 138/1988 or the collective agreement referred to in Form M dated on 21 July 1993.
>
> (3) The company further states that upon proper interpretation of the relevant documents, no SRA and bonus are due and payable to the employees concerned.
>
> (4) Further and in the alternative, the company will contend that the issues are to be dealt with under a 'trade dispute' and not within the scope of s 33(1) of [the Industrial Relations] Act 1967.

After hearing arguments, the court agreed with the appellant. This is what it said in its written award dated 6 January 1994 ('the second award'):

> The court's order is clear. It orders the claimants: (i) to be reinstated without loss of seniority; (ii) to be paid back wages from the date of dismissal to the date of reinstatement, calculated at 26 days per month in accordance with the daily wages as set out in Sch S [it should read Sch A] of the award. It does not mention any other benefits. It is a specific order, plainly written out. Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. And it is not within our jurisdiction to say that the learned chairman ought or ought not to give such and such benefits upon order of reinstatement. And also it is not within our jurisdiction to rewrite the order when the order is clear and unambiguous. It is a strong thing to read into the order, words which are not there, and in the absence of clear necessity, it is a wrong thing to do. For these reasons we reject the union's application.
>
> If the union feels that the claimants are entitled to any benefits under the provisions of the collective agreement, it should, as suggested by the company in its statement in reply, come by way of a dispute under s 26 of the Industrial Relations Act 1967.

Unhappy with the decision of the court, the respondent took out a motion for certiorari and mandamus. The High Court acceded to that application, quashed the second award and issued mandamus directing the court to render an interpretation according to law. As earlier observed, it is against that decision that the present appeal has been brought.

The submissions of counsel

The submissions of Encik Varughese, made in support of the appeal, may be summarized as follows:

(1) The court, in making the first award, was empowered by s 30(6) of the Act to merely award arrears of wages and to deprive the workmen of other benefits. The court having done precisely this, the first award is clear, unambiguous and requires no interpretation.

(2) The suggestion by the respondent appears to be that the appellant acted contrary to the terms of the collective agreement. If that be the case, then it is open to the respondent to enforce the collective agreement upon a complaint of non-compliance under s 56 of the Act.

(3) In the circumstances of this case, other remedies were open to the respondent. These include the making of an application under s 33A of the Act, or despite the ouster in s 33B, an application for certiorari and mandamus. Alternatively, the respondent ought to have proceeded under s 26 of the Act, and applied to the Minister to refer the matter as a trade dispute to the court.

(4) The court performed the function required of it by law and rendered an interpretation of the first award.

(5) In industrial law, certiorari will only go if it demonstrated to a conviction that the court made an error of law that affects its jurisdiction.

(6) The function of a court considering an application for certiorari is limited to one of review only and on no account should it be treated as an appeal.

(7) Certiorari is not available to review a decision made by the court in the exercise of its interpretative jurisdiction under s 33 of the Act.

(8) The interpretative jurisdiction of the court is separate and distinct from its enforcement jurisdiction under s 56. The court being a creature of statute has no inherent jurisdiction to exercise these two powers together. No countenance ought to be given to an attempt to intermix the two distinct jurisdictions or to obtain relief under the latter in the guise of an approach under the former. If this is permitted, it would amount to an abuse of the established statutory machinery.

(9) In the present case, the court did not exceed its jurisdiction when it held the first award to be unambiguous. Accordingly, certiorari was not warranted.

A Encik Ponnudurai, counsel for the respondent, aptly summed up the appellant's case as being twofold. The first complaint, he said, was that the respondent ought not to have resorted to s 33(1). The second, is that the award is unambiguous and required no interpretation, so that the court committed no error of law in the second award.

B In response to these two complaints, Encik Ponnudurai made the following submissions:

(1) The respondent, in the present state of the law, rightly resorted to s 33 (1) of the Act.

(2) What was asked of the court was not merely an interpretation of the C first award but also of the two relevant articles in the collective agreement earlier reproduced in this judgment. This, counsel submitted, was made amply clear in the statutory Form M prescribed by r 14 of the Rules.

(3) The Industrial Court failed to render the interpretation asked of it, D and thereby made an error of law that went to its jurisdiction.

(4) Section 33(1) and (2) refer to two separate and distinct situations. Section 33(1) is concerned with interpretations, pure and simple, while s 33(2) empowers the Industrial Court to vary an award which is uncertain or ambiguous. Neither ambiguity nor uncertainty is a E necessary legal postulate in s 33(1).

(5) In making the second award, the court should have interpreted the expression 'back wages' and determined whether it did or did not include the special relief allowance and bonus. In failing to do so, it failed to perform the function required of it by law.

F (6) The court ought not to have concerned itself as to whether the first award was ambiguous or not. That was an irrelevant consideration to the application before it. By approaching the application on the footing of ambiguity in the first award, the court asked itself the wrong question, took into account an irrelevant consideration and thereby exceeded its jurisdiction.

G (7) It is not the law that the court ought never to exercise its interpretative power when dealing with a case of enforcement under s 56. Each case must depend on its own facts. The court could and should interpret an award or a collective agreement when considering a complaint of non-compliance under s 56 of the Act. Cases that H appear to state the contrary are either wrongly decided or should be confined to their peculiar facts.

Rather than commenting upon each of these submissions, I have decided to deal with the particular subjects they raise, and where appropriate, to express my acceptance or rejection of them.

I *Construction of the Act*

It is beyond doubt that the Act is a piece of beneficent social legislation, by which Parliament intends the prevention and peaceful and speedy resolution

of disputes between employers and their workmen. In other words, the object of Parliament in enacting the law is to promote industrial harmony. That object finds expression in the preamble to the Act which reads as follows:

> An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

Now, there is a principle of great antiquity and repute that a judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the legislature as gathered from the words of the enactment and from such other sources as the law declares admissible. Permissible aids to construction include, after the landmark decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, reports in the Hansard.

In my judgment, this approach when applied to the interpretation of welfare or of social legislation demands that such legislation must *ex necessitae rei* receive a liberal interpretation in order to achieve the object aimed at by Parliament. There is respectable authority that supports this view.

In *Western India Automobile Association v Industrial Tribunal, Bombay* AIR 1949 FC 111 at p 115, Mahajan J, when delivering the judgment of the court said:

> We shall next examine the Act, to determine its scope. The Act is stated in the preamble to be one providing for the investigation and settlement of industrial disputes. Any industrial dispute as defined by the Act may be reported to Government who may take such steps as seem to it expedient for promoting conciliation or settlement. It may refer it to an industrial court for advice or it may refer it to an industrial tribunal for adjudication. The legislation substitutes for free bargaining between the parties a binding award by an impartial tribunal. Now, in many cases, an industrial dispute starts with the making of number of demands by workmen. If the demands are not acceptable to the employer — and that is what often happens — it results in a dismissal of the leaders and eventually in a strike. No machinery for reconciliation and settlement of such disputes can be considered effective unless it provides within its scope a solution for cases of employees who are dismissed in such conditions and who are usually the first victims in an industrial dispute.

In *Workmen of Dimmakuchi Tea Estate v Management of Dimmakuchi Tea Estate* (1958) 1 LLJ 500, SC, Sarkar J at p 526 in the dissent delivered by him, cited with approval the following passage in the judgment of Chagla CJ in *Narendra Kumar Sen v Labour Appellate Tribunal* (1953) 1 LLJ 6 at p 10:

> The Industrial Disputes Act was enacted, as Mr Desai rightly says, to bring about peace in the country, to avoid conflicts between employers and labourers, to prevent strikes and lock-outs, to see that the production in our country does not suffer by reason of constant and continuous labour troubles.

Finally, in *Workmen of Indian Standards Institution v Management of Indian Standards Institution* (1976) 1 LLJ 33 at p 39, when dealing with the meaning of the definition of the term 'industry' appearing in the Industrial Disputes Act 1947 of India, Bhagwati J (in the Supreme Court) observed that:

> ... it is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry', so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'. Whenever a question arises whether a particular concern is an 'industry', the approach must be broad and liberal, and not rigid or doctrinaire. We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to (sic) its avowed social objective.

Whilst great care must be taken in adopting decisions of foreign courts upon the meaning to be attributed to particular statutory formulae that differ from those appearing in the Act, I think that the judicial sentiments expressed in the Indian cases in the context of construction may quite safely be applied when interpreting the Act. Indeed, it has been done before.

In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 (a case of dismissal under s 20(1) of the Act), Chang Min Tat FJ (at p 312) cited with approval the following passage in the judgment of Gajendragadkar J in *RB Diwan Badri Dass & Ors v Industrial Tribunal, Punjab, Patiala & Ors* AIR 1963 SC 630 at pp 633–634:

> The broad and general question raised ... on the basis of the employer's freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice ...
>
> *The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice* ... Industrial adjudication does not recognize the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. Similarly the right to dismiss an employee is also controlled subject to well-recognized limits in order to guarantee security of tenure to (industrial) employees ... (Emphasis added.)

Later, in the same judgment, Chang Min Tat FJ said [at p 313]:

> Be it noted that the words 'or a reference to it under section 20(3)' were introduced by an amendment in 1975, bringing a non-union member under the scope of the award in this s 30. Be it also noted that s 16A which was repealed and replaced by s 20 contained provisions for the alternative award of compensation in lieu of reinstatement. Any suggestion therefore that this award of compensation is now lost to the workman must mean that Parliament has deliberately taken a step which cannot but be regarded as

> entirely retrograde and which is therefore completely at variance with *the social legislation in the Act.* (Emphasis added.)

That the Act intends industrial harmony by the speedy disposal of trade disputes (an expression which I use in the widest context), was accepted by the Supreme Court in *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81, a case in which the apex court found its conclusion to be:

> ... wholly in consonance with the principle that differences and disputes in industrial relations *ex necessitae rei* requires to be determined and disposed of as expeditiously as possible — a prescriptive postulate statutorily endorsed and affirmed in s 30(3) ... (per Abdoolcader SCJ, at p 84).

There can be no clearer recognition than these pronouncements with regard to the nature of the statute that has fallen for consideration in this appeal and of the object it seeks to achieve. For my part, I would with respect, gratefully accept and adopt the philosophy expressed by the Federal and the Supreme Courts when construing the Act.

Ouster of jurisdiction

The next topic that requires consideration is the ability of the High Court to exercise judicial review over awards of the court in the face of a privative clause. The attempt by Parliament to exclude judicial review is, in this instance, expressed in s 33B(1) of the Act which provides as follows:

> Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

Until the rather controversial decision of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165, a preponderance of Malaysian authority, when dealing with the precursor to s 33B(1), favoured the view that the High Court's supervisory jurisdiction to quash an administrative decision for an error of law not going to jurisdiction was not excluded by the ouster clause.

The high level watermark of the pre-*Firebricks* era is the decision of Syed Othman J (later FJ) in *Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Ors* [1974] 1 MLJ 90, in which appears the following passage (at p 92 of the report), upon which the Privy Council, with great respect, placed a strained interpretation:

> From all these authorities, [which included *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147], I am inclined to think that the better view of the law is that a plea that the court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all. In the present case, I would say that *the decision of the Minister can be questioned if it can be shown that it was reached as a result*

A *of no proper enquiry, or of failure to comply with the prescribed procedure for an enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law.* (Emphasis added.)

Of this statement of the law, Lord Fraser said ([1981] AC 363 at p 371; [1980] 2 All ER 689 at p 693; [1980] 2 MLJ 165 at p 167):

B That statement is capable of being read, and was read in the argument before their Lordships, as meaning that any decision which was 'not according to law', in the sense of containing an error of law, could be quashed by certiorari. If that is what the statement was intended to mean their Lordships would be unable to agree with it. But having regard to an earlier passage in the judgment it seems that, when the judge referred to a decision that was C 'not according to law', he had in mind a case in which a commissioner in arriving at his decision had 'deliberately ignored the law'. In that more limited sense the statement is unexceptionable but it does not support the argument for the appellants.

The other decision that ranks at par with *Kannan* is *Lian Yit Engineering* D *Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41, where Abdul Hamid J (as he then was) expressed the following view at p 43:

It is, I think, well established law that this court has power to issue an order of certiorari to quash an Industrial Court's decision which, on the face of it, is wrong in law...

E The Board overruled this statement of principle in the following passage ([1981] AC 363 at p 372; [1980] All ER 689 at p 694; [1980] 3 MLJ 165 at p 167):

In the opinion of their Lordships the statement quoted is erroneous and the decision, which was in accordance with it, should be overruled, although it F is possible that the decision might be supported on the ground (mentioned but not considered) that the Industrial Court had acted in excess of its jurisdiction: see p 44.

With great respect to Lord Fraser, neither the passage in the judgment of Syed Othman J in *Kannan* nor that in the judgment of Abdul Hamid J in G *Lian Yit Engineering* deserved the treatment it received in the hands of the Privy Council. Indeed, I would go so far as to say that the Malaysian cases may not have met the fate that they did, and the administrative law of this country would not have taken a step backwards, if the Board in *Fire Bricks* had truly understood and appreciated the effect of the decision in *Anisminic*.

H The Judicial Committee (of which Lord Edmund-Davies and Lord Keith were members) heard arguments in *Fire Bricks* on 30 and 31 October 1979, as well as on 21 and 22 April 1980. The Board handed down its judgment on 24 June 1980. On 3 June 1980, the House of Lords (the coram of which included Lord Edmund-Davies and Lord Keith) I heard arguments in *Re Racal Communications Ltd* [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181. The decision in that case was handed down on 3 July 1980. Four of the five Law Lords delivered full speeches, with only Lord Edmund-Davies referring to the decision in *Fire Bricks*. Lord Keith agreed with the speech of Lord Diplock, in which appears this

significant passage at [1981] AC 374 at pp 382–383; [1980] 2 All ER 634 at pp 638–639; [1980] 3 WLR 181 at pp 186–187:

> I turn next to the question of the availability of judicial review instead of appeal as a means of correcting mistakes of law made by a court of law as distinct from an administrative tribunal or other administrative authority, however described when it is exercising quasi-judicial functions. In *Anisminic* [1969] 2 AC 147, this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. *The breakthrough made by Anisminic was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity* ... (Emphasis added.)

It is, to say the least, quite amazing that Lord Keith was able to be a party to the narrow, restrictive approach laid down by Lord Fraser in *Fire Bricks*, and not long thereafter, to also express his unqualified agreement with the diametrically opposed view stated by Lord Diplock in *Racal*.

Lord Diplock reiterated his view in *O'Reilly v Mackman* [1983] 2 AC 237 at p 283; [1982] 3 All ER 1124 at pp 1132–1133 where, after referring to the reform in procedure effected by the amendments to RSC O 53, he said:

> This reform may have lost some of its importance since there have come to be realised that the full consequences of *Anisminic*, in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure ...

In *Racal Communications*, Lord Diplock spoke of the ability of Parliament to oust the jurisdiction of the courts. The futility of such an attempt is well illustrated by the decision in *Re Yee Yut Ee* [1978] 2 MLJ 142. There, the Industrial Arbitration Court of Singapore held the applicant, Yee, as secretary and director of a limited company, liable for the payment of claims and debts of the company. Section 46 of the Industrial Relations Act (Cap 24) which contained the following wide ouster:

> Subject to the provisions of this Act an award shall be final and conclusive, and no award or decision or order of a Court or the President or a referee shall be challenged, appealed against, reviewed, quashed, or called in question in any court and shall not be subject to certiorari, prohibition, mandamus or injunction in any court on any account ...

presented no difficulty to Choor Singh J. In issuing certiorari and quashing the decision he said [at pp 144–145]:

> It is clear that no appeal is given from a decision of an Industrial Arbitration Court. When Parliament sets up a tribunal and refers matters to it, it becomes a question of policy as to whether to provide for an appeal. Sometimes that is thought to be appropriate. Thus, in the Land Acquisition Act (Cap 272) provision is made for the hearing of appeals by a Land Appeals Board against awards made by Collectors of Land Revenue in respect of land acquired by the Government. It is enacted that though the decision of the Land Appeals Board (presided by a judge) was to be final, there could be an appeal to the Court of Appeal by a party aggrieved by a decision of the Board on any point of law. Sometimes, on the other hand, it is not thought appropriate to provide for an appeal. In reference to the Industrial Relations Act, it was presumably thought that the advantages of securing finality of decisions outweighed any disadvantages that might possibly result from having no appeal procedure.
>
> Provisions similar to s 46 have been labelled 'no certiorari' clauses or 'ouster clauses' and have been dealt with in many reported cases. *The cases show that when the right to certiorari had been expressly taken away by statute the courts rely upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court.* It has been held that certiorari would issue, notwithstanding the presence of words taking away the right to apply for it, if the inferior tribunal was improperly constituted or if it lacked or exceeded jurisdiction, or failed to comply with essential preliminaries, or if a conviction or order had been procured by fraud or collusion or where there has been a breach of the rules of natural justice.
>
> The courts have, however, always been careful to distinguish their intervention whether an excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review:
>
> > '... that supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise (*R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at p 156).' (Emphasis added.)

Anisminic was among the authorities relied upon in arriving at the foregoing conclusion.

On the facts of that case, Choor Singh J gave the following reasons as to why the order made by the Industrial Arbitration Court could not stand [at p 144]:

> The second issue is whether or not there is any error of law on the face of the record. Here again, I think the issue is free of doubt. *The impugned order made by the President of the Industrial Arbitration Court on 9 January 1978 to the effect that the applicant is personally liable for the payment of $10,180.63 is clearly erroneous in law.* The applicant was not a party to the proceedings in which this order was made. The parties to the proceedings were the company and the union.
>
> It is true that at the date of the impugned order, the applicant was a director of the company. It is however a cardinal principle of company law that except in cases of fraud, breach of warranty of authority and other exceptional circumstances, a director is not liable for the debts of an incorporated company. There is nothing in the Companies Act (Cap 185) which makes a director personally liable for the debts of the company. Nor is there anything in the Industrial Relations Act (Cap 124) which modifies this fundamental doctrine of company law. No one would ever volunteer to be a director of an incorporated company if he or she was to be held liable in law for the debts of the company.
>
> *The impugned order is quite clearly illegal because it is not authorized by law.* There is accordingly a patent error of law on the face of the record. This is very correctly conceded by counsel for the respondent. (Emphasis added.)

Of Lord Diplock's dictum in *Racal Communications*, Wan Suleiman SCJ said in *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 at p 309:

> It would seem that the House of Lords, without saying so in so many words, was moving towards the majority view in *Pearlman*'s case [*Pearlman v Keepers and Governors of Harrow School* [1979] 1 QB 56; [1979] 1 All ER 365; [1978] 3 WLR 736].
>
> In *Re Racal Communications* the obiter view of Lord Diplock signals the move in that direction ...

The clearest possible indication that the distinction between errors of law that go to jurisdiction and errors that do not, ought no longer to be maintained, is to be found in the following passage in the judgment of Mohamed Azmi SCJ in *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 at p 24:

> With the complete deletion of s 53A (renumbered s 57) from the Act with effect from 30 May 1980 by Act A484 and the introduction of a new s 33A, reference on question of law has been taken from the Attorney-General and moved back to the High Court. It would seem to us that the transfer exercise by the legislature indicates a clear intention to limit the severity of the ouster clause on the remedy of certiorari. It may also indicate the intention of the legislature to curtail the full impact of the Privy Council decision. Perhaps the time will come for this court to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications* and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman v Harrow School* in discarding the distinction between an error of law which affected jurisdiction and one which did not. There is no degree of nullity and if there is an error of law on which the Industrial Court's

award depends, the remedy of certiorari should not be excluded by 33B(1). *In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction.* Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing 'to do something in the course of the inquiry which is of such a nature that its decision is a nullity' as referred to by Lord Reid at p 171 in *Anisminic*'s case, or the court 'having asked themselves the wrong question' as referred to by Lord Diplock at p 187 in *Re Racal Communications*. (Emphasis added.)

It is significant that even the jurisdiction in which the distinction arose, and was maintained has authoritatively abandoned it.

In *Page v Hull University Visitor* [1993] AC 682 at pp 701–702; [1993] 1 All ER 97 at p 107, Lord Browne-Wilkinson, delivering his speech for the majority (Lord Mustill and Lord Slynn dissenting, but not on this issue), put an end to the fallacy that has plagued this area of public law for so long. He said:

> I accept much of Mr Burke's submissions. Over the last 40 years the courts have developed general principles of judicial review. *The fundamental principle is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully.* In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223), reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully: see Wade *Administrative Law* (6th Ed, 1988) at p 39ff. The one possible exception to this general rule used to be the jurisdiction of the court to quash a decision taken within the jurisdiction of the decision-taker where an error of law appeared on the face of the record: *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122; [1952] 1 KB 338. (Emphasis added.)
>
> In my judgment the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires. Professor Wade considers that the true effect of the *Anisminic* case is still in doubt: see *Wade* at p 299ff. But in my judgment the decision of this House in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said that the decision in the *Anisminic* case:
>
> > 'has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric

> distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity.' (See [1983] 2 AC 237 at p 278; [1982] 3 All ER 1124 at p 1129.)
>
> Therefore, I agree with Mr Burke that in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law. (Emphasis added.)

One cannot help noticing the striking similarity between the statement of the principle by Lord Browne-Wilkinson in *Page* (in that part of his speech upon which I have laid emphasis), and that stated by Syed Othman J in *Kannan*, some 20 years earlier, in language that was disapproved of by the Privy Council in *Fire Bricks*.

In my opinion, the time that Mohamed Azmi SCJ spoke of in *Enesty* is now at hand. It would indeed be a misfortune if this court failed to seize the moment and act upon the inspiration offered by his Lordship in that case.

In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

It follows, from what I have said, that the decision of the Board in *Fire Bricks* and all those cases approved by it are no longer good law. By

A the same token, *Kannan* [1974] 1 MLJ 90 and *Lian Yit Engineering Works* [1974] 2 MLJ 41, though disapproved of or overruled by the Board, must now be taken to have always correctly stated the law.

In arriving at this conclusion, I have not overlooked the following passage in the judgment of Jemuri Serjan CJ (Borneo) in *Harpers Trading* B *(M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 425:

> Even assuming we were wrong in construing back wages or the compensation taken as a whole as wages and therefore attract the application of the EPF Act, such errors are within jurisdiction and not errors going to jurisdiction to render the award a nullity. Applying the principles in *South East Asia Fire* C *Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* per Lord Fraser of Tullybelton at p 168; *R v Governor of Brixton Prison, ex p Armah* per Lord Reid at p 234; and *Pearlman v Keepers and Governors of Harrow School* per Lord Geoffrey Lane LJ at p 74; we are of the view that certiorari will not lie.

D It is of vital importance to note that the Supreme Court in *Harpers* was deprived of the benefit of the judgment of Mohamed Azmi SCJ in *Enesty* [1986] 1 MLJ 18. It appears that neither that decision nor *Re Racal Communications* [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181 nor *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124 were brought to the attention of the Supreme Court. *Page* was, of course, yet to E be decided. In these circumstances, convinced as I am by the cogent reasons advanced by Mohamed Azmi SCJ in *Enesty* and by Lord Browne-Wilkinson in *Page*, I respectfully prefer to adopt those views, in preference to the views expressed by the learned Chief Justice of Borneo in *Harpers*.

For these reasons I am unable, with regret, to accede to the submission F of appellant's counsel that we ought still to follow the decision in *Fire Bricks* and hold that awards of the court may not be attacked save for jurisdictional error. As observed by Jain & Jain, *Principles of Administrative Law* (4th Ed) at p 648:

> The difficulty in the *South East* view is that a tribunal can misinterpret the G law without worrying about court interference and the tribunal becomes the final judge of the law which is contrary to the basic premise of the common law approach. This dichotomy can be got over, as suggested above, by giving a wide meaning to the term 'jurisdictional error' so as to include breach of natural justice and error of law therein. This will dilute privative clauses and make the courts, not the administration or the tribunal, as the H final judge of law.

There remains to be dealt with, one other case mentioned by Encik Varughese in the course of his argument on this point. It is *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136. In that case, the employer sought a declaration that an award of the court was invalid by reason of an error I on the face of the record. Abdoolcader J (as he then was), while agreeing that the award of the court contained an error of law, held that declaration did not lie, and that certiorari was the proper remedy. He said at p 139:

> It would therefore appear to me to be clear on the authorities which I have discussed and notwithstanding the equivocal decision in *Taylor v National*

> *Assistance Board* [1956] P 470 that I am precluded from making the declaration sought for mere error of law on the face of the record which does not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity. The correct and appropriate procedure would in the circumstances have been an application for an order of certiorari to quash the award, and in my view certiorari would indeed have been the only remedy available to the applicant. (Emphasis added.)

According to that learned judge, declaration did not lie because, 'There would then be two inconsistent decisions, one of the Industrial Court and the other of this court, subsisting side by side.' The decision in *Sungai Wangi* depends for its correctness on there existing a distinction between jurisdictional and non-jurisdictional errors. Even in the state of the law as it then stood, by reason of the decision in *Kannan*, Abdoolcader J ought to have recognized that an error of law rendered invalid any decision arrived at in consequence of such error. As such, a declaration to the effect that the award in that case was a nullity could have been granted without any difficulty. I have, therefore, no hesitation in holding that *Sungai Wangi* was wrongly decided and should be overruled.

Of course, the remedy of a declaratory judgment is quite useless if a matter has to be remitted to the court for further consideration. In such circumstances, certiorari and mandamus remain the only effective remedies.

It is strange that in this day and age, so much should depend on the kind of remedy that is applied for in this area of the law. I think that this should not be so. In my opinion, an amendment to O 53 is certainly called for in this respect.

Interpretation or enforcement

In order to properly appreciate the rival contentions advanced in this case, the relevant statutory provisions upon which the arguments are based must be looked at.

The interpretative jurisdiction of the court is to be found in s 33 of the Act. Its enforcement jurisdiction is contained in s 56 of the Act. These sections read as follows:

> 33 Interpretation and variation of awards and agreements.
>
> (1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.
>
> (2) The Court may, upon the application of any party, by order vary any of the terms of an award or agreement, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.
>
> (3) The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.
>
> (4) The decision of the Court shall be binding in the same manner as the original award or agreement.

(5) The expression 'Court' for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under section 22 for the purpose.

56 Non-compliance with award or collective agreement.

(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.

(2) The Court may, upon receipt of the complaint —

(a) make an order directing any party —

(i) to comply with any term of the award or collective agreement; or

(ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;

(b) make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement; or

(c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

(3) Any person who fails to comply with an order of the Court under subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit, or to imprisonment for a term not exceeding one year, or to both, and a further fine of five hundred ringgit for every day during which such offence continues.

(4) Where any sum of money is payable by any person, or, where anything, other than the payment of money is required to be done or not to be done by any person by virtue of an order made by the Court under subsection (2), and such order has not been complied with by the person to whom it is addressed, the Registrar of the Court may send a certified copy thereof to the Senior Assistant Registrar of the High Court or the Registrar of the Sessions Court having jurisdiction in the place to which the order relates or in the place where the order was made and the said Senior Assistant Registrar or Registrar, as the case may be, shall cause the said copy to be recorded and thereupon the said order shall for all purposes be enforceable as a judgment of the High Court or the Sessions Court, as the case may be, in accordance with such rules of court as may be applicable or in such manner as it may deem just or expedient:

Provided that no sale of immovable property shall, for the purposes of such enforcement, be ordered except by the High Court.

The submissions made before this court require that there be undertaken two separate exercises. The first is to determine whether the two subsections to s 33 of the Act are to be read together as conferring one and the same power upon the court or whether, as contended by Encik Ponnudurai, they refer to two separate and distinct powers. If as Encik Varughese contends, the subsections in effect confer only one power, ie to interpret and vary for ambiguity or uncertainty only, then, it follows that the court

did not, in the second award, misdirect itself in law. It would then also follow that the High Court was wrong in issuing certiorari.

Secondly, if the respondent's argument on s 33 is sound, then, whether it was correct in asking the court to interpret the first award together with arts 18 and 20 of the collective agreement, or whether, as suggested by the appellant:

(i) it should have gone by way of the machinery provided by s 56 and asked the court to enforce the collective agreement; or

(ii) treated the difference as a trade dispute and invited the Minister to make a fresh reference to the court; or

(iii) resorted to a reference under s 33A of the Act; or

(iv) taken out an application for certiorari to quash the first award.

In my opinion, both these exercises involve a question of pure construction of the relevant provisions of the Act. That construction must *ex necessitae rei* to be undertaken in accordance with the approach I adverted to earlier in this judgment.

Interpretation: the s 33 point

In my judgment, Parliament when it enacted the two subsections to s 33 intended to meet two distinct situations that so often arise in the course of industrial adjudication. The first type of case, ie one coming within s 33(1) of the Act, is where all that is involved is an interpretation of an award or an agreement. The second is where a variation of an award or collective agreement is sought by one of the parties thereto. Section 33(2) is intended to cover such a situation. The court's power to vary under the second subsection may be invoked or relied upon only in the event of an uncertainty or an ambiguity in any award or agreement. Put shortly, the first subsection deals with interpretation simpliciter, while the second subsection deals with variation.

The present case affords a good example of a case falling under the first subsection. The first award speaks of 'back wages'. The appellant says that that expression is limited to the basic wage receivable by the workmen on the formula used by the court. The respondent, on the other hand, says that 'back wages' includes other emoluments, such as the special relief allowance and bonus. All that the court had to do was to interpret the meaning of the expression 'back wages'.

Had the respondent sought a variation of the terms of the first award, then and then only, would any question of ambiguity or uncertainty have become of any relevance. But that is not what the respondent sought in the instant case.

Now, the application made by the respondent makes it clear beyond peradventure that it was moving the court under s 33(1) of the Act. As I have said, it used Form M which is required to be used in applications made under s 33(1) of the Act. If an application under s 33(2) is intended,

A then Form N has to be used. Rules 14 and 15 [of the Rules] which specify the kind of form that is to be lodged read as follows:

> Interpretation or Variation
>
> 14 Interpretation of Award or Collective Agreement.
>
> B (1) An application made under section 33(1) of the Act for a decision on any question arising as to the interpretation of any award or collective agreement taken cognizance of by the Court shall be made by delivering to the Registrar at the premises of the Court during office hours or forwarding to him at such premises by AR Registered Post six copies of the application in Form M.
>
> C (2) The place, date and time for the hearing of the parties on the question shall be fixed by the President and notified to the parties by the Registrar by endorsement on the application.
>
> (3) The Registrar shall serve copies of such application endorsed as aforesaid on the parties bound by the award or collective agreement.
>
> D 15 Variation of Award or Collective Agreement
>
> (1) An application made under section 33(2) of the Act for the variation of any of the terms of an award or collective agreement shall be made by delivering to the Registrar at the premises of the Court during office hours or forwarding to him at such premises by AR Registered Post six copies of the application in Form N.
>
> E (2) The place, date and time for the hearing of the parties on the application shall be fixed by the President and notified to the parties by the Registrar by endorsement on the application.
>
> (3) The Registrar shall serve copies of such application endorsed aforesaid on the parties bound by the award or collective agreement.

F A careful reading of the relevant statutory provisions, including rr 14 and 15, leaves me in no doubt that the interpretation I have placed upon s 33 is correct. To reiterate, that section houses two powers: interpretation and variation, the latter being dependent for its exercise upon the presence of uncertainty or ambiguity.

G I find support for my conclusion from the following passage in the judgment of Abdoolcader J (as he then was) in *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 at p 177:

> H ... Section 33(1) ... empowers the Minister to refer any question as to interpretation of an award or for any party to apply for this purpose to the Industrial Court for a decision thereon ... *This leaves the provisions of s 33(2) by virtue whereof the Industrial Court may, upon the application of any party, by order vary any of the terms of an award if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty* ... (Emphasis added.)

I I am therefore, entirely in agreement with the submission of Encik Ponnudurai on this point. Accordingly, I have no hesitation whatsoever in rejecting the argument advanced by Encik Varughese. If I were to accede to his submission and treat the two subsections to s 33 as conferring a single remedy, I shall with respect, be stultifying the true

intention of Parliament as expressed in this piece of social legislation. That, of course, I am not prepared to do.

Enforcement: the s 56 point

Having found that the respondent had correctly sought the exercise of the court's power to interpret the first award, it does not really become necessary to deal with the appellant's submission that resort ought to have been had to other remedies, including that provided for in s 56 of the Act. Nevertheless, in deference to the painstaking effort with which both counsel so fully argued this point, I think it behoves this court to deal with it.

Counsel for the appellant based his submission on the premise that in the circumstances of this case, what the respondent was in truth complaining about was non-compliance with the terms of the collective agreement, in particular, arts 18 and 20. That being the case, so the argument goes, the respondent ought to have instituted proceedings for non-compliance under s 56 of the Act. In my judgment, this argument must fail, both on principle and authority.

First, it is crystal clear that neither the appellant nor the court had been misled by the respondent's application. That the appellant and the court travelled the same path as the respondent is made amply clear by the statement in reply delivered by the appellant. I have already set out the relevant paragraphs of that statement earlier in this judgment. Perhaps I should remind myself of the critical paragraph in it. It is para 3 which reads:

> The company further states that upon proper interpretation of the relevant documents, no SRA and bonus are due and payable to the employees concerned.

There it is plain for all to see. The appellant had itself raised the issue of interpretation. By no stretch of the imagination can it be said that the appellant or the court was being led to believe that enforcement was being sought by the respondent through the machinery of s 33(1).

Secondly, the two authorities cited by the appellant do not appear to support the argument advanced by it. Both authorities are decisions of the Supreme Court. The first of these is *Holiday Inn, Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306, the headnote to which reads:

> The appellant and the respondent (on behalf of the employees of the appellant) had entered into a collective agreement and this had been given cognizance by the Industrial Court. The collective agreement provided, inter alia, for the collection of a 10% service charge on bills and receipts specified in the Service Tax Act 1975. The appellant was to retain 12% and the remaining 88% of the gross amount was to be distributed to employees of the appellant in accordance with a scheme of distribution set out in the collective agreement.
>
> The respondent lodged a complaint to the Registrar of the Industrial Court alleging that the appellant had neglected to comply with the collective agreement in that the appellant had not computed the service charge for the

ordinary and hourly rate of pay for the weekly rest day, public holiday and overtime. The appellant denied the allegations of the respondent and stated that the collective agreement did not include service charge for computing the ordinary rate of pay. It also stated that it was not a contractual obligation to pay service charge pursuant to the collective agreement.

The Industrial Court allowed the claim of the respondent. The Industrial Court interpreted the collective agreement and held that a share of the service charge is part of the remuneration of the employees of the appellant and that for the purpose of calculating the rest day pay, public holiday pay and overtime, the ordinary rate of pay includes the share of the service charge payable to the employees. It also directed the appellant to pay the arrears.

The appellant was dissatisfied with the order of the Industrial Court and obtained leave from a judge of the High Court for an order of certiorari. The High Court dismissed the notice of motion on the grounds, inter alia, that the Industrial Court acted within its jurisdiction. The appellant appealed.

In the Supreme Court, Seah SCJ (with whom Lee Hun Hoe CJ (Borneo) agreed) when allowing the appeal said at pp 311–312:

> Now, s 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognizance of by the court under s 17 after a complaint has been lodged as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in sub-s (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant.
>
> Applying this to the facts of this case, it follows that when the complaint of the Union under s 56(1) of the Act was received, the first function of the Industrial Court was to inquire into and finally determine the question whether the Union had brought its case within the terms that the Hotel had not complied with the collective agreement which had been taken cognizance of by the Industrial Court. If the court had decided that the Hotel had not committed a breach of the term of the collective agreement, then it should not proceed further in the matter. On the other hand, if the court found that the Hotel had failed to comply with the term of the collective agreement which formed the subject matter of the complaint, then and only then could it exercise the statutory powers contained in sub-s (2) thereof.
>
> Instead of confining itself to the preliminary issue, the Industrial Court in this case proceeded to interpret and adjudicate the Union's complaint that 'service charge' should be included in the computation of 'ordinary rate of pay' for purposes of: (i) weekly rest day pay; (ii) public holiday pay; and (iii) overtime pay, and purported to make an order under s 56(2) of the Act directing the Hotel to pay the arrears on or before 31 March 1981.
>
> ...
>
> In my judgment, under s 56 of the Act the Industrial Court is charged with the enforcement of an award or collective agreement which has been taken cognizance of by the court after a complaint has been received alleging non-compliance with one or more terms of the award or said collective agreement. On the authority of the *Federal Hotel* case [1983] 1

MLJ 175, the Industrial Court is not charged with the duty of interpreting or adjudicating the term or terms of an award or collective agreement which are disputed by the contracting parties concerned. *Section 33 provides for this and the legislature has laid down certain procedures to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under s 33 can only be exercised on a definite application made for that purpose (see the Federal Hotel case). In other words, any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of s 56.* (Emphasis added.)

Wan Suleiman SCJ at pp 309–310 recorded his dissent in the following terms:

Once a complaint is lodged under s 56 that a term or terms of the collective agreement is not being complied with or if what was on the face of it such a complaint is in effect an application under s 33(1) for interpretation of such terms of the award, then the court is seised with the narrow jurisdiction referred to both in the *National Union of Hotel, Bar & Restaurant Workers v Casuarina Beach Hotel Sdn Bhd* [1986] 2 MLJ 17 a decision of this court, as well as in the earlier decision of *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297. Having been seised with jurisdiction, the Industrial Court then has a wider jurisdiction to examine the complaint on its merit and by virtue of s 33B of the Industrial Relations Act, the Industrial Court having been properly seised with the narrow sort of jurisdiction mentioned in the first place (sometimes also called the threshold jurisdiction), the ouster clause then comes into effect, and accordingly its decision 'shall not be challenged, appealed against, reviewed, quashed or called in question in any court'. This would be so even if it had made an error of law.

However, I would, with respect, say that the Industrial Court did not appear to have been in error of law. It had properly invoked art 3 of the collective agreement in applying s 60I(1) of the Employment Ordinance 1955 as embodying benefits in the law more favourable than those in the agreement in holding that ordinary rate of pay includes the service charge payable to employees of the company.

The second is *Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor* [1991] 1 MLJ 89 in which the following passage appears (at p 90) in the judgment of Harun Hashim SCJ:

In a complaint of non-compliance with any term of a collective agreement or award under s 56 of the Industrial Relations Act 1967, the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely *enforcement* function. It should not embark on an expedition to examine the provisions of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the *interpretative* function of the court under s 33 of the Industrial Relations Act 1967 which is an entirely different exercise from that under s 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under s 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33. It is also important to separate the two functions in order to determine which particular

jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the court, the first under s 33 to invite the court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under s 56. [Emphasis provided.]

In the instant case, the matter came before the Industrial Court as a complaint of non-compliance with the first award under s 56 but the resulting second award is in substance an interpretative exercise with a detailed discussion on s 60A of the Employment Act 1955. It is clear therefore that the real issue before the Industrial Court was on the interpretation of art 26(4) of the award read with art 14. *It follows that the union ought not to have made a complaint under s 56 alleging non-compliance when its interpretation of the terms of the first award was disputed by the company. It should have applied to the court under s 33 for interpretation.* We accordingly find that there is a jurisdictional error on the face of the record and the learned judge ought to have issued certiorari to quash the award. (Emphasis added.)

The effect of the majority judgment in *Holiday Inn* and the decision in *Dragon & Phoenix* may be summarized thus:

(i) where an employer and his workmen are in dispute over the meaning of the terms of an award or collective agreement, resort should be had to s 33(1) and not to s 56(1) of the Act; and

(ii) if, in the event of such dispute as aforesaid, resort is had to s 56(1), the court has no jurisdiction to offer an elaborate interpretation of the terms of the award or agreement in question and direct compliance of the interpreted version. If it does so, it exceeds its jurisdiction.

So stated, these decisions, which are plainly binding precedent, tell against the appellant's contention. In the present case, there was a dispute between the parties as to the meaning of the expression 'back wages' appearing in the first award. The respondent was, in the present state of the authorities, obliged, first to apply for an interpretation under s 33(1) and then, if there was any non-compliance, to make a fresh application under s 56(1) to meet that exigency. This is precisely what the respondent did. No adverse comment may therefore be legitimately directed against it.

I would add that, as a necessary consequence of the views I have heretofore expressed, there was no necessity whatsoever for the respondent to have resorted to those other remedies (apart from s 56) suggested in the third submission of counsel for the appellant. I am also of the firm view that there has been no abuse of the relevant statutory provisions as contended by the appellant.

I think that the answer to the argument of counsel for the appellant that the respondent should have proceeded under s 26 of the Act (which is also the view expressed by the court in the second award) is met by the decision in *Dunlop Industries* [1987] 2 MLJ 81. In that case, the employer had terminated the services of certain workmen in what was alleged by the union to be in breach of the terms of the relevant collective agreement. The union commenced proceedings for non-compliance under s 56(1) of the Act. The court found for the workmen and directed their reinstatement.

An argument that the matter should have been proceeded with as a trade dispute under s 26, and not as a complaint of non-compliance was rejected: A

> ... as otherwise recourse would have to be had to a reactivation ab initio and repetition of the whole tedious exercise of the conciliation and consequential process under s 26 by reference to the Industrial Court once again for resolving a trade dispute in a clear and uncontroverted case of mere non-compliance with a term of an award or collective agreement taken cognizance of by the Industrial Court [per Abdoolcader SCJ [1987] 2 MLJ 81 at p 84.] B

Much the same could be said in response to the appellant's argument in the present case.

I think it appropriate at this stage to deal with the respondent's sixth submission. No useful purpose will be accomplished by its repetition here. However, my views on the correctness of Encik Ponnudurai's argument now follow. C

The dissenting judgment of Wan Suleiman SCJ in *Holiday Inn* [1988] 1 MLJ 306 certainly supports the respondent's contention. Apart from his opinion upon the effect of the ouster clause in s 33B of the Act, I find nothing objectionable in his Lordship's dissent in that case. Indeed, that dissent correctly recognizes that ss 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances. The power of the court to interpret an award or a collective agreement which has been taken cognizance of cannot, to borrow the more descriptive language of Macbeth, be "cabin'd, cribb'd and confined". D E

Accordingly, in my judgment, the question whether the court, when entertaining a complaint under s 56(1) of the Act has indeed acted in excess of its jurisdiction by exercising its powers under s 33(1) is one that depends upon the peculiar circumstances of a particular case. F

There may be circumstances, such as those as existed in *Federal Hotel v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award or collective agreement is a sine qua non to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complainant is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement of industrial disputes. It follows therefore, that the extreme proposition that the court, when considering a complaint under s 56(1), may never interpret an award or collective agreement in any circumstances is fallacious and not worthy of a second glance. G H I

Accordingly, I am of opinion that there is merit in the respondent's submissions on this point.

Immunity of awards made under s 33(1)

To recollect, counsel for the appellant submitted that the remedy of certiorari is not available to quash awards of the court handed down in the exercise of its interpretative jurisdiction. In support of that submission, Encik Varughese relied on the judgment of Hashim Yeop A Sani J (as he then was) in *Trengganu Bus Co Sdn Bhd v Transport Workers Union* [1983] 1 MLJ 393, where that learned judge is reported as having said at pp 395–396:

> Section 33B provides that any award, decision or order of the Industrial Court including a decision whether to grant or not to grant an application under s 33A shall be final and conclusive and shall not be challenged in any court. But it is settled law that despite the finality clause such decision may still be reviewed to ascertain if it was made without or in excess of jurisdiction. However it must be noted that the present application does not seek to quash the decision of the Industrial Court made under s 33A of the Act. Instead it seeks to quash the award No 147 of 1980 which was an 'interpretation award' made under s 33 of the Act. I have grave doubt that this is allowed by the Act because the function of the Industrial Court under s 33 is merely to interpret its own award and to make such variation to the award for the purpose solely of removing ambiguity or uncertainty. This in fact is clearly expressed in the language of s 33(2) of the Act. In my opinion according to the scheme of the Act it is imperative that some finality must be read into the power of the Industrial Court to interpret its own award. Moreover the Industrial Court itself should be regarded as the most competent authority to interpret its own award. For these reasons it is my view that it is not the intention of the statute to allow an applicant to seek this court's aid to quash an order of the Industrial Court under s 33 of the Act.

It would require the most convincing of reasons for me to depart from a view expressed by so eminent a judge. However, having had the benefit of jurisprudence that has flowed since the decision in *Trengganu Bus Co*, I have no alternative but to regretfully express my disagreement with the statement of principle in that case. I would go so far as to say that *Holiday Inn* and the subsequent cases must be taken to have overruled *Trengganu Bus Co sub silentio*.

In my judgment, the decision in *Trengganu Bus Co* is not good law and should be formally overruled. The court is an inferior tribunal created by statute. Hence, it is the function, indeed the duty, of the High Court to exercise supervision over all its decisions. The circumstances and the extent to which such supervision will lie is regulated by those well established principles that govern prerogative remedies. One such principle is that in exercising its supervisory jurisdiction, the High Court does not act as an appellate court. What it concerns itself with, is the decision-making process and not the merits of the decision itself.

In *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, the Supreme Court approved and applied the following passage appearing in the speech of Lord Brightman in *Chief*

Constable of the North Wales Police v Evans [1982] 3 All ER 141 at p 154; [1982] 1 WLR 1155 at p 1173:

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed [in *Ridge v Baldwin & Ors*] [1963] 2 All ER 66 at p 91, [1964] AC 40 at p 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to:
>
> > 'a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice. ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.'
>
> *Judicial review is concerned, not with the decision, but the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.* (Emphasis added.)

For these reasons I would reject the submission of the appellant that certiorari does not lie against decisions made by the court in the exercise of its power under s 33(1) of the Act.

The effect of s 30(6)

The appellant has argued that the court in making the first award was entitled to grant relief short of what was claimed by the respondent. This, the appellant says, the court is entitled to do in the exercise of its powers under s 30(6) of the Act. Having acted thus, the court was, in making of the second award, entitled to declare that the first award was unambiguous.

I have already dealt with the nature and scope of the court's duty when considering an application under s 33(1) of the Act. Whether the court acted in accordance with the terms of the statute is a matter I shall come to later. The point that requires immediate attention is the nature and extent of the court's power under s 30(6). It is an argument that has been specifically raised by the appellant and I think that I am obliged to deal with it.

Section 30(6) reads as follows:

> 30 Awards
>
> ...
>
> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

Now, this subsection is based on s 42 of the Conciliation and Arbitration Act 1904–1950 (Cth) of Australia. It is a Commonwealth statute. In its

last revision in 1973, s 42 has been amended and renumbered as s 55. Section 42 in its original form read as follows:

> In making an order or award in relation to an industrial dispute, the Court or a Conciliation Commissioner shall not be restricted to the specific relief claimed by the parties to the industrial dispute, or to the demands made by the parties in the course of the dispute, but may include in the order or award any matter or thing, which the Court or Commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further industrial disputes.

The revised version reads:

> 55 In making an award in relation to an industrial dispute, the Commission is not restricted to the specific relief claimed by the parties to the industrial dispute, or to the demands made by the parties in the course of the dispute, but may include in the award any matter or thing which the Commission thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further industrial disputes.

Section 42 has received judicial consideration in at least two decisions of the High Court of Australia. In *R v Commonwealth Court of Conciliation and Arbitration, ex p Kirsch* (1938) 60 CLR 507 at p 538, Dixon J explained the philosophy underlying the section in these words:

> Now, apart altogether from this development of the law, it has been well understood that, when a dispute in relation to any particular term of employment or condition of labour is before the court for settlement, the power of the court extends to the making of such award as appears apt and proper to determine the dispute and to give just relief from the substantial grievance from which it arises. In spite of the many unrealities which have attended the growth of the jurisdiction, the discretion of the court to provide that remedy which on investigation appears best calculated to achieve the chief purpose of the court, namely, the settlement of industrial disputes, has never been restricted by a requirement that it should rigidly adhere to one or other of the rival proposals or desires of the respective parties. This principle retains its place in the system and must be applied to the developed condition of the law. *But the court cannot make an award except for the settlement of the actual dispute between the parties, and, therefore, it is beyond its jurisdiction to impose an obligation upon them or one of them that is not related to the disagreement or issues between them, that is, to the matter of the dispute.* Many expressions have been used to describe the kind and the degree of connection which is necessary. It is sometimes said that the relief contained in the award must be relevant. Sometimes that it must be reasonably incidental to the settlement of the differences constituting the dispute. Sometimes that it must be appropriate to the settlement of the dispute; that is, the relief must have a rational or natural tendency to dispose of the question at issue. *In applying a test of such a nature, it is important to understand the true character of the two things to be brought into comparison, the matter of the dispute and the provision proposed.* To obtain a correct understanding of the matter in dispute, it is not enough to read the text of a log of demands without regard to any of the facts and circumstances out of which it arises. A log is not an instrument with a prescribed legal

effect. It is nothing but a catalogue of claims supposed to represent the real desires of actual people. (Emphasis added.)

Again in *R v Galvin & Anor, ex parte Amalgamated Engineering Union* (1952) 86 CLR 34 at p 40, Dixon CJ, Webb, Fullagar and Kitto JJ, when delivering the majority judgment of the court said:

> An award cannot give a form of relief that is not relevant to a matter in dispute, that is not reasonably incidental or appropriate to the settlement of that part of the dispute and that has no natural or rational tendency to settle the particular question in dispute. But the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated.
>
> The principle is formulated by s 42 of the Conciliation and Arbitration Act 1904–1951 [sic], although in language which may possibly be read too widely because of the words 'which the court or commissioner thinks necessary or expedient for the purpose of preventing or settling the dispute or of preventing further ... disputes'. These words might be taken to allow a more remote or tenuous connection with the dispute than is requisite as a matter of objective fact.
>
> But in the present case the question is whether by dropping the expression of purpose the commissioner has given relief of a kind different in substance from that claimed. To drop the reference to purpose was no doubt wise, because an issue as to the purpose of a corporate body is one which ought not to be set as a criterion of liability, so troublesome and uncertain is the ascertainment of the fact likely to be.
>
> The substantial grievance forming the basis of the claim in the log was the incitement or encouragement by an organization of conduct prejudicial to regular work in accordance with the terms and conditions sought.
>
> The clause in the log described in terms chosen by the claimants the precise relief considered sufficient to deal with the grievance. The award chooses another form of relief in some ways wider, in some ways narrower. But when the matter is examined and the distinction is observed between the substantive question and the precise form of relief, what the award does appears sufficiently relevant to the dispute arising from the claim, and to be reasonably incidental to its settlement.

Both these judgments were referred to with approval by Murphy J in *R v Clarkson & Anor, ex p General Motors-Holden's Pty Ltd & Ors* (1975) 134 CLR 56. His Honour's comments about s 55 of the Australian provision, in the following passage, so well reflect my own thinking upon s 30(6) of the Act, that I would, subject to the appropriate commutation of the references therein to the adjudicating authority, gratefully adopt all that he said there as my own:

> This section is of the utmost importance to the proper operation of the Australian Conciliation and Arbitration Commission, even taking into account the cautionary words in *Galvin*'s case. It is one of the means which Parliament has adopted to free the Commission from excessive technicalities and to enable it to exercise its powers effectively. The work of the Commission will be stultified unless full scope is given to the principle of flexible remedy referred to in *Galvin*'s case.

A Further, taking into account the striking similarity between the language of the Australian section, whether in its original or amended form, and s 30(6) of the Act, I consider the views expressed in *Kirsch* and *Galvin* to be pertinent and helpful when determining the scope and applicability of s 30(6). I pause to point out that 'the log' spoken of in *Kirsch* is the B equivalent of the statements of case and reply prescribed by the Rules.

In my judgment, the limits imposed by s 30(6) will not be exceeded, so long as there is a rational nexus between the relief and the dispute it seeks to resolve, bearing in mind that a flexibility of approach is called for when considering the relief that is to be granted by the court in a particular case. This then is the true extent of the court's powers under s 30(6) of the C Act.

There is one other matter which requires comment. During his final address to us, Encik Varughese, in response to a question put by me, suggested that the statutory direction contained in the subsection under discussion is confined to trade disputes and references under s 20(3), D those being the only two matters mentioned in the subsection. In this, counsel would appear to have wholly overlooked s 52(2) of the Act which reads as follows:

> The provisions of this Act relating to trade dispute other than section 26(2) and section 30(4) shall apply to any matter referred to or brought to the E notice the Court under this Act.

Now, nothing could be a clearer declaration of Parliamentary intention that the court is to have regard to the provisions of s 30(6) when dealing with, inter alia, an application for interpretation under s 33(1) or for a variation under s 33(2) of the Act. I have therefore no difficulty in rejecting F the narrower construction canvassed by Encik Varughese.

Having said this, I now return to the mainstream.

That the requisite nexus existed in the relief granted by the court in the first award is beyond any challenge. Certiorari proceedings taken out by the appellant to quash the first award failed; so did an appeal to the G Supreme Court. But all this does not assist the appellant in the present case. For what the court was called upon to do in the application made to it by the respondent was to render an interpretation under s 33(1) of the Act. The critical question is, whether it erred in law when it held the first award to be unambiguous and therefore requiring no interpretation.

H *Validity of the second award*

In the light of the observations that I have made, the court, faced with the respondent's application under s 33(1), was under a statutory duty to interpret the first award and the two relevant articles in the collective agreement. Since the statute does not prescribe uncertainty or ambiguity I as a condition precedent to the exercise of the jurisdiction in question, the court most certainly erred in construing s 33(1).

Further, by conducting a search for an ambiguity and uncertainty in the first award, the court took into account an irrelevant consideration,

ie a matter not prescribed by the section under discussion. By the same process, it asked itself the wrong question when undertaking the decision-making process.

It is therefore quite clear that the court made an error of law in the second award. It is unnecessary for me to ascertain whether that error goes to jurisdiction: suffice that it is an error of law. In the circumstances of the present appeal it happens that the error in question is jurisdictional; but as I have earlier said that is not of the essence.

Accordingly, the second award is invalid and is liable to be quashed by certiorari. Having failed to perform its duty under s 33(1) of the Act, it is a necessary adjunct that the matter be remitted to the court with a direction that it consider the respondent's application according to law. These are the orders that the learned judge made in the court below. I think that he was right in doing so.

The result

For the reasons that appear in this judgment I would dismiss the appeal and affirm all orders, including the order for costs, made by the High Court. The respondent shall have the costs of this appeal, towards account of which, the deposit paid by the appellant shall be paid out to the respondent.

Before I conclude, I wish to thank both counsel who appeared in the appeal for their careful arguments.

NH Chan JCA: I have had the advantage of reading the judgments of my Lords, Gopal Sri Ram and VC George JJCA in draft, and I also agree that the appeal should be dismissed. I agree with the judgment of my Lord Gopal Sri Ram JCA on s 33(1) and (2) and to the consequential orders that my Lord proposes to make. I am also in full agreement with my Lords that the time has come to do away with the distinction between an error of law which goes to jurisdiction and one which does not.

VC George JCA: I have had the opportunity of reading the judgment in draft of Gopal Sri Ram JCA, and respectfully agree that this appeal should be dismissed, and that the consequent orders that my learned brother proposes be made, should be made. Because this judgment seeks to resolve a controversy on an important aspect of Malaysian public law, I would touch on one or two aspects of the matter which perhaps will lend some further weight to the thrust of the main judgment that has just been read.

The appeal primarily turned on two issues of moment to which I shall restrict myself, the first of which relates to that most important aspect of public law, the ouster of jurisdiction clause in Acts of Parliament. The second issue of narrower application, pertains to the construction to be given to s 33(1) and (2) of the Industrial Relations Act 1967 ('the Act').

A The privative clause in the instant case which has given this court the opportunity of giving due consideration to the attempts by Parliament to exclude judicial review of decisions made by authorities including administrative tribunals even purportedly in respect of questions of law, is s 33B(1) of the Act which is a classic ouster clause and which is as follows:

B > Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

C Encik TM Varughese, counsel for the appellant, had submitted that the effect of the ouster clause in the Act is that *certiorari* was only available if the appellant could show that there was an error of law by the Industrial Court which was not a mere error on the face of the record but that which went to the jurisdiction. He relied on *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* D [1981] AC 363; [1980] 2 All ER 689; [1980] 2 MLJ 165, in which the Privy Council reviewed the Malaysian cases on the point and disagreed with counsel for the appellant that there was a line of authority in Malaysia holding that it was settled law that the power of the High Courts to grant certiorari to quash awards of Industrial Courts for errors of law on the face E of the record, had not been excluded. In *Fire Bricks,* the Privy Council relied on the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 168, taking the view that that judgment had ruled that in respect of ouster clauses, a distinction should be drawn to an error amounting to the tribunal acting without jurisdiction and an error which does not affect F its jurisdiction and that certiorari could only be called to aid in the former. Lord Fraser who delivered the judgment of the Board referred to and refused to accept the suggestion by Lord Denning MR in *Pearlman v Keepers and Governors of Harrow School* [1979] 1 QB 56; [1979] 1 All ER 365; [1978] 3 WLR 736, 'that this distinction should now be discarded'. Lord Denning had gone on to say [1979] 1 QB 56 at p 70; [1979] 1 All G ER 365 at p 372; [1978] 3 WLR 736 at p 744:

> ... The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as H to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction I and certiorari will lie to correct it ...

In the course of the submissions made to us, Gopal Sri Ram JCA invited counsel's attention to the House of Lords decision in *Page v Hull University Visitor* [1993] AC 682; [1993] 1 All ER 97 in which it can be seen that the

effect of *Anisminic* was referred to both by the coram in that case, and by Lord Diplock, to whose speech in *O'Reilley v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, reference was made, to mean something diametrically opposite to the effect given to *Anisminic* by *Fire Bricks*. Lord Browne-Wilkinson said at [1993] AC 682 at p 701; [1993] 1 All ER 97 at p 107:

> In my judgment the decision in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires. Professor Wade considers that the true effect of the *Anisminic* case is still in doubt: see *Wade* at p 299ff. But in my judgment the decision of this House in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said that the decision in the *Anisminic* case:
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> > 'has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity. (See [1983] 2 AC 237 at p 278; [1982] 3 All ER 1124 at p 1129.)

And so it would appear that counsel who appeared for the appellant in *Fire Bricks* was in effect vindicated and also that it has turned out that Syed Othman J (as he then was) in *Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Anor* [1974] 1 MLJ 90, and Abdul Hamid J (as he then was) in *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41, were after all expressing the law correctly when they said, in the case of the former that, the Minister can be questioned, inter alia, for a failure to comply with the law, and in the case of the latter that, 'It is I think, well established law that this court [ie the High Court] has power to issue an order of certiorari to quash an Industrial Court's decision which, on the face of it, is wrong in law'.

Fire Bricks was a Malaysian case, and the judgment of the Board is a binding precedent and, accordingly I was somewhat troubled by finding myself constrained to run foul of the holding the Privy Council had made in that judgment. No doubt that consistent with judicial discipline and stare decisis, our courts have been following *Fire Bricks*, but in the face of the ratio of the many post-*Fire Bricks* judgments of the House of Lords,

including *Page, O'Reilly v Mackman* and *Re Racal Communication* [1981] AC 374; [1980] 2 All ER 634; [1980] 3 WLR 181, relied on by Mohamed Azmi SCJ in *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18, and upon a re-reading of *Kannan, Lian Yit Engineering* and *Pearlman v Keepers and Governors of Harrow School,* it would appear that in *Fire Bricks,* the Board had misread the effect of *Anisminic,* and that *Fire Bricks* may be regarded as controversial as a result of which it is now open to the superior courts in Malaysia to refuse to follow *Fire Bricks* if they chose to do so, without being guilty of judicial impertinence or indiscipline.

I respectfully share my brother Gopal Sri Ram JCA's view that the time, referred to by Mohamed Azmi SCJ in *Enesty Sdn Bhd,* has now come to pass, for us here to respectfully accept Lord Denning's suggestion made in *Pearlman v Keepers and Governors of Harrow School* to discard the distinction between an error of law affecting jurisdiction and one which did not. The distinction that has been suggested, first by Lord Denning and later by Lord Diplock, is really esoteric. In effect, what Lord Diplock said in *O'Reilly v Mackman* is that the inferior courts, statutory tribunals and other authorities are not given the jurisdiction to make an error of law, and it follows that such error of law, whether on the face of the record or not, in reality goes to jurisdiction, in that the decision-maker had not been given the jurisdiction to make errors of law. Accordingly, I would respectfully concur with Gopal Sri Ram JCA in his holding that the decision of the Privy Council in *Fire Bricks* is no longer good law.

I now come to the construction point in respect of the two subsections of s 33 which are as follows:

> (1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.
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> (2) The Court may, upon the application of any party, by order vary any of the terms of an award or agreement, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

Encik TM Varughese's point is that the Industrial Court, on a reference to it pursuant to s 33(1) by the Minister or as in the instant case, on the application by a party, for a decision on a question that has arisen as to the interpretation of any term or expression in a collective agreement or in an award, may only deal with it if there is some ambiguity or uncertainty in respect of the term or expression. In Encik Varughese's submission, the said sub-ss (1) and (2) have to be taken together. Subsection (1) he submits, is only an enabling provision. Section 33 may be invoked for the purpose solely of removing by variation any ambiguity or uncertainty.

He was supporting the Industrial Court, which had refused to be drawn into any interpretation of the term 'back wages', because it took the view that there was no ambiguity or uncertainty in the expression, or in the award that had been handed down.

In my judgment, Parliament had enacted the two sub–ss 33(1) and (2), each to cover different situations; s 33(1) in respect of the need for an

interpretation of some term or provision either in an award or in a collective agreement, and s 33(2) when seeking, not an interpretation, but a variation which however can only be sought for the purpose of removing some uncertainty or ambiguity in an award or in a collective agreement.

Encik Anand Ponnudurai, counsel for the respondents, I think aptly illustrated the two different situations that the two subsections were respectively designed for.

The application to the Industrial Court, which was the subject of this appeal, was for an interpretation of 'back wages' in the earlier award of the court. What the applicant wanted to know was whether on a true construction of 'back wages' in the context, bonuses and certain allowances referred to as 'SRA' in the collective agreement, were deemed to be included. This situation he submitted, and I agree with this submission, fell squarely within a s 33(1) situation. The expression 'back wages' was used in the context of the collective agreement and an interpretation of it vis-à-vis the award was called for, and could be and was properly sought invoking s 33(1).

For a situation calling for a s 33(2) application, the illustration given was a case of an award directing that back wages be paid without fixing the date from which such back wages should be computed. That calls for uncertainty that calls for a variation of the award that would have the effect of fixing the date from which the back wages has to be computed. Such a variation would have the effect of removing the uncertainty.

That which clinches the submission that there is a deliberate dichotomy manifested by there being the two subsections is the provision of separate prescribed forms to make the respective applications in respect of each subsection, Form M for the application for an interpretation and Form N for the application for a variation.

In my judgment, the Industrial Court erred in construing s 33 as calling in every case for a situation of uncertainty or ambiguity before the section could be invoked. That was an error of law. In view of the opinion I have reached earlier in this judgment that any error of law by an inferior tribunal entitled the High Court to apply for certiorari and have the decision questioned, it is my judgment that the learned judge of the High Court should have ruled as he did that the decision by the Industrial Court on the Form M application was wrong.

Appeal dismissed.

Reported by Kevin Ooi